



This document is scheduled to be published in the Federal Register on 09/30/2013 and available online at <http://federalregister.gov/a/2013-23703>, and on [FDsys.gov](http://FDsys.gov)

**DEPARTMENT OF DEFENSE**

**GENERAL SERVICES ADMINISTRATION**

**NATIONAL AERONAUTICS AND SPACE ADMINISTRATION**

**48 CFR Parts 3 and 52**

**[FAC 2005-70; FAR Case 2013-015; Item I; Docket 2013-0015,  
Sequence 1]**

**RIN 9000-AM56**

**Federal Acquisition Regulation; Pilot Program for Enhancement  
of Contractor Employee Whistleblower Protections**

**AGENCY:** Department of Defense (DoD), General Services Administration (GSA), and National Aeronautics and Space Administration (NASA).

**ACTION:** Interim rule.

**SUMMARY:** DoD, GSA, and NASA are issuing an interim rule amending the Federal Acquisition Regulation (FAR) to implement a statutory pilot program enhancing whistleblower protections for contractor employees.

**DATES:** Effective: [INSERT DATE OF PUBLICATION IN THE  
**FEDERAL REGISTER.**]

Applicability: In accordance with FAR 1.108(d)(3), contracting officers are encouraged to include the changes in these rules in major modifications to contracts and orders awarded prior to the effective date of this interim rule.

Comment Date: Interested parties should submit written comments to the Regulatory Secretariat on or before

[insert date 60 days after FEDERAL REGISTER publication date] to be considered in the formulation of a final rule.

**ADDRESSES:** Submit comments identified by FAC 2005-70, FAR Case 2013-015, by any of the following methods:

- Regulations.gov: <http://www.regulations.gov>.

Submit comments via the Federal eRulemaking portal by searching "FAR Case 2013-015" Select the link "Submit a Comment" that corresponds with "FAR Case 2013-015". Follow the instructions provided at the "Submit a Comment" screen. Please include your name, company name (if any), and "FAR Case 2013-015" on your attached document.

- Fax: 202-501-4067.
- Mail: General Services Administration,  
Regulatory Secretariat (MVCB), ATTN: Ms.  
Flowers, 1800 F Street, N.W., 2<sup>nd</sup> Floor,  
Washington, DC 20405.

Instructions: Please submit comments only and cite FAC 2005-70, FAR Case 2013-015, in all correspondence related to this case. All comments received will be posted without change to <http://www.regulations.gov>, including any personal and/or business confidential information provided.

**FOR FURTHER INFORMATION CONTACT:** Ms. Patricia Corrigan, Procurement Analyst, at 202-208-1963, for clarification of content. For information pertaining to status or

publication schedules, contact the Regulatory Secretariat at 202-501-4755. Please cite FAC 2005-70, FAR Case 2013-015.

**SUPPLEMENTARY INFORMATION:**

**I. Background**

DoD, GSA, and NASA are issuing an interim rule amending the Federal Acquisition Regulation (FAR) to implement a four-year pilot program to enhance the existing whistleblower protections for contractor employees at FAR subpart 3.9. The pilot program is mandated by section 828, entitled "Pilot Program for Enhancement of Contractor Employee Whistleblower Protections," of the National Defense Authorization Act (NDAA) for Fiscal Year (FY) 2013 (Pub. L. 112-239, enacted January 2, 2013).

Paragraph (a) of section 828 adds to title 41 a new section 4712 that contains the elements of the pilot program, which took effect by operation of law on July 1, 2013, and is effective through January 1, 2017. Paragraph (c) of section 828 suspends the pre-existing whistleblower protections in 41 U.S.C. 4705 "(w)hile section 4712 of this title is in effect..." (i.e., from July 1, 2013, through January 1, 2017). Accordingly, this interim rule creates a new FAR section 3.908 to implement section 4712. The rule leaves intact FAR sections 3.901 through 3.906, which implement the pre-existing whistleblower protections in 41 U.S.C. 4705, but suspends their applicability during the

period when the pilot is in effect. Absent Congressional action, these authorities will automatically be reinstated when the pilot authority sunsets.

The interim rule also clarifies that the pilot authority applies to title 41 agencies and is inapplicable to DoD, NASA, and the Coast Guard. The latter three agencies are covered by 10 U.S.C. 2409, which was amended by section 827 of the NDAA to impose permanent requirements very similar to the temporary requirements of the pilot program established in title 41.

Section 4712 and its implementing regulations (1) protect contractor or subcontractor employees against reprisal for activities protected by FAR 3.908-3(a) and (2) do not change any right or remedy otherwise available to the employee.

FAR 3.907, which addresses whistleblower protections under the American Recovery and Reinvestment Act of 2009, is unaffected by this rule.

## **II. Discussion and Analysis**

FAR section 3.908, entitled "Pilot program for enhancement of contractor employee whistleblower protections," is a self-contained complete implementation of the pilot program requirements in section 828 of the NDAA for FY 2013. FAR 3.908-1 spells out exemptions from the pilot for DoD, NASA, and the Coast Guard, as well as

elements of the intelligence community in accordance with the requirements in 41 U.S.C. 4712(f)(1) and (2). FAR 3.908-2 includes the definitions of "abuse of authority" and "Inspector General" from paragraph (g) of 41 U.S.C. 4712, as added by section 828.

The specific prohibited actions that constitute reprisal and the entities to whom disclosing information constitutes whistleblowing as defined in 41 U.S.C. 4712 are similar to, but not exactly the same as, the current FAR contractor whistleblower coverage. These are addressed in the policy subsection, FAR 3.908-3. This subsection also clarifies what constitutes disclosure as that term is used in the law and the FAR coverage.

FAR subsections 3.908-4 and -5 include procedures for filing complaints and procedures for the Inspector General to investigate complaints. This coverage reflects paragraph (b) of 41 U.S.C. 4712.

The interim rule addresses remedies at FAR 3.908-6. The source material for this subsection is paragraphs (c)(1) through (3), and (c)(7) of 41 U.S.C. 4712. The law puts the remedies in the hands of the head of the agency and provides time lines for action. Under the law, the agency head may decide that the report of the Inspector General does not provide sufficient basis to conclude that the contractor employee has been subjected to reprisal. If, however,

sufficient basis does exist, then the agency head must either issue an order denying relief or order the contractor to take one or more of the following actions:

(1) Take affirmative action to abate the reprisal.

(2) Reinstate the complainant-employee to the position that the person held before the reprisal, together with compensatory damages (including back pay), employment benefits, and other terms and conditions of employment that would apply to the person in that position if the reprisal had not been taken.

(3) Pay the complainant-employee an amount equal to the aggregate amount of all costs and expenses (including attorneys' fees and expert witnesses' fees) that were reasonably incurred for, or in connection with, bringing the complaint regarding the reprisal. The law also provides that complainants, after they are deemed to have exhausted all administrative remedies, may bring an action at law or equity against the contractor.

Paragraphs (c) (4) and (c) (5) of 41 U.S.C. 4712 address procedures for enforcement of the orders issued by the head of the agency. These paragraphs are implemented at FAR 3.908-7, and they require the agency head to file an action for enforcement in the U.S. district court if a person fails to comply with an order issued under section (c) (1) of 41 U.S.C. 4712, describe the types of relief that the court may

grant, and allow the whistleblower complainant-employee to join in the action or separately file an action for enforcement. Further, the law enables persons adversely affected by an order issued by the agency head to request review in the U.S. Court of Appeals for a circuit in which the reprisal is alleged in the order to have occurred. There is a 60-day time limit for such filing from the date that the agency head issued the order.

Paragraph (h) of section 4712 provides that nothing in the new law may be construed to provide any rights to disclose classified information not otherwise provided by law. This important caveat has been included at subsection 3.908-8 of the FAR.

A new contract clause is provided for the pilot program, in accordance with paragraph (d) of section 4712. The clause informs offerors that employees working on any Government contract are subject to the whistleblower rights and remedies of the pilot program and requires the contractor (and its subcontractors) to inform their employees in writing of employee whistleblower rights and protections under 41 U.S.C. 4712 in the predominant native language of the workforce.

The interim rule applies the pilot to purchases of commercial items and commercially available off-the-shelf (COTS) items. This implementation is consistent with the

implementation of the whistleblower protections in 41 U.S.C. 4705.

### **III. Executive Orders 12866 and 13563**

Executive Orders (E.O.s) 12866 and 13563 direct agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributive impacts, and equity). E.O. 13563 emphasizes the importance of quantifying both costs and benefits, of reducing costs, of harmonizing rules, and of promoting flexibility. This is a significant regulatory action and, therefore, was subject to review under section 6(b) of E.O. 12866, Regulatory Planning and Review, dated September 30, 1993. This rule is not a major rule under 5 U.S.C. 804.

### **IV. Regulatory Flexibility Act**

DoD, GSA, and NASA do not expect this rule to have a significant economic impact on a substantial number of small entities within the meaning of the Regulatory Flexibility Act, 5 U.S.C. 601, et seq. However, an Initial Regulatory Flexibility Analysis (IRFA) has been performed and is summarized as follows:

This interim rule was initiated to amend the FAR to implement a four-year pilot program to enhance the existing whistleblower protections for contractor employees at FAR subpart 3.9. The pilot program is



mandated by section 828, entitled "Pilot Program for Enhancement of Contractor Employee Whistleblower Protections," of the National Defense Authorization Act (NDAA) for Fiscal Year (FY) 2013 (Pub. L. 112-239, enacted January 2, 2013). The law establishes a pilot program for the period ending on January 1, 2017. Based on a reading of 41 U.S.C. 3101(c) and sections 827 and 828 of the NDAA for FY 2013, the pilot program will apply to all Federal agencies except DoD, NASA, and the Coast Guard. Except for contracts funded under the American Recovery and Reinvestment Act of 2009 (see 3.907), the current protections for contractor whistleblowers are established in law at 41 U.S.C. 4705; paragraph (c) of section 828 suspends 41 U.S.C. 4705 "(w)hile section 4712 of this title is in effect..." Paragraph (a) of section 828 adds the new section 4712 to title 41 that contains the elements of the pilot program and is effective until January 1, 2017.

With the exception of DoD, NASA, and the Coast Guard, as well as any element of the intelligence community, as defined in section 3(4) of the National Security Act of 1947 (50 U.S.C. 401(a)(4)), the pilot program applies to the employees of Government contractors and their subcontractors. DoD, GSA, and NASA do not expect the pilot program, which applies to the majority of entities doing business with the Government regardless of business size, to have a significant economic impact specific to small entities. The following information is provided as a means of estimating the overall numbers of entities to which the rule will apply. Based on Federal Procurement Data System reporting data, in Fiscal Year 2012, a Government-wide total of 273,970 new awards that exceeded the simplified acquisition threshold were made to small businesses and other than small businesses by agencies other than DoD, NASA, and the Coast Guard. Of that total, 95,436 new award actions were made to small business entities. The remaining 178,534 award actions were made to other than small businesses.

A new contract clause is provided for the pilot program, in accordance with paragraph (d) of section 4712. The clause informs offerors that employees working on any contract awarded are subject to the whistleblower rights and remedies of the pilot program and requires the contractor (and its subcontractors), regardless of business size, to inform their employees in writing of employee whistleblower rights and protections under 41 U.S.C. 4712.

There is no requirement for small entities to submit any information under this clause. The rule does not duplicate, overlap, or conflict with any other Federal rules.

There are no practical alternatives that will accomplish the objectives of the interim rule.

The Regulatory Secretariat has submitted a copy of the IRFA to the Chief Counsel for Advocacy of the Small Business Administration. A copy of the IRFA may be obtained from the Regulatory Secretariat. DoD, GSA and NASA invite comments from small business concerns and other interested parties on the expected impact of this rule on small entities.

DoD, GSA, and NASA will also consider comments from small entities concerning the existing regulations in subparts affected by this rule in accordance with 5 U.S.C. 610. Interested parties must submit such comments separately and should cite 5 U.S.C. 610 (FAC 2005-70, FAR Case 2013-015) in correspondence.

#### **V. Paperwork Reduction Act**

The interim rule does not contain any information collection requirements that require the approval of the Office of Management and Budget under the Paperwork Reduction Act (44 U.S.C. chapter 35).

#### **VI. Determination to Issue an Interim Rule**

A determination has been made under the authority of the Secretary of Defense (DoD), the Administrator of General Services (GSA), and the Administrator of the National Aeronautics and Space Administration (NASA) that urgent and compelling reasons exist to promulgate this interim rule, without prior opportunity for public comment. This action is necessary for the following reasons:

First, by operation of law, the new statute for the pilot program became effective on July 1, 2013, i.e., Congress included language in section 828(b) specifically addressing the effective date of 41 U.S.C. 4712. The statute for the pilot program imposes new responsibilities on agencies, and creates certain new rights for contractor and subcontractor employees. Specifically, as of July 1, 2013:

- There are changes and additions in the list of entities to whom a whistleblower disclosure makes the whistleblower employee eligible for additional protections against reprisal;
- Agency heads have expanded responsibilities to take specific actions with regard to a finding by the Inspector General of the executive agency involved of reprisal against a contractor whistleblower;
- The law requires that the written notice to employees of their whistleblower rights must be provided in the "predominant native language of the workforce;" and
- Contractors must flow down to their subcontractors the requirement to provide written notice to their employees.

In addition, there is a new exemption for elements of the intelligence community that was not available under previous laws.

The most effective and efficient way to ensure awareness and compliance by agencies and their contractors with all of these requirements is through immediate regulatory change. Delaying promulgation may delay the effective date of regulations but will not postpone when the law becomes applicable to contractors (and subcontractors). Thus, ordinary notice and comment procedures would unnecessarily increase the risk of confusion and noncompliance, defeating the regulatory objective.

Moreover, there is little likelihood that the publication of this rule without prior comment will increase burden on contractors. This interim regulation provides basic guidance that agencies and contractors need to comply with the statute. Indeed, this regulation prescribes little beyond that which is set forth clearly in the statute. However, pursuant to 41 U.S.C. 1707 and FAR 1.501-3(b), DoD, GSA, and NASA will consider public comments received in response to this interim rule in the formation of the final rule.

**List of Subjects in 48 CFR Parts 3 and 52**

Government procurement.

Dated: September 24, 2013.

William Clark,  
Acting Director,  
Office of Government-wide  
Acquisition Policy,  
Office of Acquisition Policy,  
Office of Government-wide Policy.

Therefore, DoD, GSA, and NASA amend 48 CFR parts 3 and 52 as set forth below:

**PART 3—IMPROPER BUSINESS PRACTICES AND PERSONAL CONFLICTS OF INTEREST**

1. The authority citation for 48 CFR part 3 is revised to read as follows:

**Authority:** 40 U.S.C. 121(c); 10 U.S.C. chapter 137; and 51 U.S.C. 20113.

2. Revise section 3.900 to read as follows:

**3.900 Scope of subpart.**

This subpart implements three different statutory whistleblower programs. This subpart does not implement 10 U.S.C. 2409, which is applicable only to DoD, NASA, and the Coast Guard.

(a) 41 U.S.C. 4705 (in effect before July 1, 2013 and on or after January 2, 2017). Sections 3.901 through 3.906 of this subpart implement 41 U.S.C. 4705, applicable to civilian agencies other than NASA and the Coast Guard, except as provided in paragraph (c) of this section. These sections are not in effect for the duration of the pilot program described in paragraph (b) of this section.

(b) 41 U.S.C. 4712 (in effect on July 1, 2013 through January 1, 2017). Section 3.908 of this subpart implements the pilot program, applicable to civilian agencies other

than NASA and the Coast Guard, except as provided in paragraph (c) of this section.

(c) Contracts funded by the American Recovery and Reinvestment Act. Section 3.907 of this subpart implements section 1553 of the American Recovery and Reinvestment Act of 2009 (Pub. L. 111-5), and applies to all contracts funded in whole or in part by that Act.

3. Add sections 3.908 through 3.908-9 to subpart 3.9 to read as follows:

**3.908 Pilot program for enhancement of contractor employee whistleblower protections**

**3.908-1 Scope of section.**

(a) This section implements 41 U.S.C. 4712.

(b) This section does not apply to—

(1) DoD, NASA, and the Coast Guard; or

(2) Any element of the intelligence community, as defined in section 3(4) of the National Security Act of 1947 (50 U.S.C. 3003(4)). This section does not apply to any disclosure made by an employee of a contractor or subcontractor of an element of the intelligence community if such disclosure—

(i) Relates to an activity of an element of the intelligence community; or

(ii) Was discovered during contract or subcontract services provided to an element of the intelligence community.

### **3.908-2 Definitions.**

As used in this section—

Abuse of authority means an arbitrary and capricious exercise of authority that is inconsistent with the mission of the executive agency concerned or the successful performance of a contract of such agency.

Inspector General means an Inspector General appointed under the Inspector General Act of 1978 and any Inspector General that receives funding from, or has oversight over contracts awarded for, or on behalf of, the executive agency concerned.

### **3.908-3 Policy.**

(a) Contractors and subcontractors are prohibited from discharging, demoting, or otherwise discriminating against an employee as a reprisal for disclosing, to any of the entities listed at paragraph (b) of this subsection, information that the employee reasonably believes is evidence of gross mismanagement of a Federal contract, a gross waste of Federal funds, an abuse of authority relating to a Federal contract, a substantial and specific danger to public health or safety, or a violation of law, rule, or regulation related to a Federal contract (including the



competition for or negotiation of a contract). A reprisal is prohibited even if it is undertaken at the request of an executive branch official, unless the request takes the form of a non-discretionary directive and is within the authority of the executive branch official making the request.

(b) Entities to whom disclosure may be made.

(1) A Member of Congress or a representative of a committee of Congress.

(2) An Inspector General.

(3) The Government Accountability Office.

(4) A Federal employee responsible for contract oversight or management at the relevant agency.

(5) An authorized official of the Department of Justice or other law enforcement agency.

(6) A court or grand jury.

(7) A management official or other employee of the contractor or subcontractor who has the responsibility to investigate, discover, or address misconduct.

(c) An employee who initiates or provides evidence of contractor or subcontractor misconduct in any judicial or administrative proceeding relating to waste, fraud, or abuse on a Federal contract shall be deemed to have made a disclosure.

**3.908-4 Filing complaints.**

A contractor or subcontractor employee who believes that he or she has been discharged, demoted, or otherwise discriminated against contrary to the policy in 3.908-3 of this section may submit a complaint with the Inspector General of the agency concerned. Procedures for submitting fraud, waste, abuse, and whistleblower complaints are generally accessible on agency Office of Inspector General Hotline or Whistleblower Internet sites. A complaint by the employee may not be brought under 41 U.S.C. 4712 more than three years after the date on which the alleged reprisal took place.

**3.908-5 Procedures for investigating complaints.**

Investigation of complaints by the Inspector General will be in accordance with 41 U.S.C. 4712(b).

**3.908-6 Statutory remedies.**

(a) Agency response to Inspector General report. Not later than 30 days after receiving an Inspector General report in accordance with 41 U.S.C. 4712, the head of the agency shall—

(1) Determine whether sufficient basis exists to conclude that the contractor or subcontractor has subjected the employee who submitted the complaint to a reprisal as prohibited by 3.908-3; and

(2) Issue an order denying relief or take one or more of the following actions:

(i) Order the contractor to take affirmative action to abate the reprisal.

(ii) Order the contractor or subcontractor to reinstate the complainant-employee to the position that the person held before the reprisal, together with compensatory damages (including back pay), employment benefits, and other terms and conditions of employment that would apply to the person in that position if the reprisal had not been taken.

(iii) Order the contractor or subcontractor to pay the complainant-employee an amount equal to the aggregate amount of all costs and expenses (including attorneys' fees and expert witnesses' fees) that were reasonably incurred by the complainant for, or in connection with, bringing the complaint regarding the reprisal, as determined by the head of the agency.

(b) Complainant's right to go to court. If the head of the agency issues an order denying relief or has not issued an order within 210 days after the submission of the complaint or within 30 days after the expiration of an extension of time granted in accordance with 41 U.S.C. 4712(b)(2)(B) for the submission of the Inspector General's report on the investigative findings of the complaint to the head of the agency, the contractor or subcontractor, and the complainant, and there is no showing that such delay is due to the bad faith of the complainant—

(1) The complainant shall be deemed to have exhausted all administrative remedies with respect to the complaint; and

(2) The complainant may bring a de novo action at law or equity against the contractor or subcontractor to seek compensatory damages and other relief available under 41 U.S.C. 4712 in the appropriate district court of the United States, which shall have jurisdiction over such an action without regard to the amount in controversy. Such an action shall, at the request of either party to the action, be tried by the court with a jury. An action under this authority may not be brought more than two years after the date on which remedies are deemed to have been exhausted.

(c) Admissibility in evidence. An Inspector General determination and an agency head order denying relief under this section shall be admissible in evidence in any de novo action at law or equity brought pursuant to 41 U.S.C. 4712.

(d) No waiver. The rights and remedies provided for in 41 U.S.C. 4712 may not be waived by any agreement, policy, form, or condition of employment.

### **3.908-7 Enforcement of orders.**

(a) Whenever a contractor or subcontractor fails to comply with an order issued under 3.908-6(a)(2) of this section, the head of the agency concerned shall file an action for enforcement of the order in the U.S. district

court for a district in which the reprisal was found to have occurred. In any action brought pursuant to this authority, the court may grant appropriate relief, including injunctive relief, compensatory and exemplary damages, and attorney fees and costs. The complainant-employee upon whose behalf an order was issued may also file such an action or join in an action filed by the head of the agency.

(b) Any person adversely affected or aggrieved by an order issued under 3.908-6(a)(2) may obtain review of the order's conformance with 41 U.S.C. 4712 and its implementing regulations, in the U.S. court of appeals for a circuit in which the reprisal is alleged in the order to have occurred. No petition seeking such review may be filed more than 60 days after issuance of the order by the head of the agency. Filing such an appeal shall not act to stay the enforcement of the order of the head of an agency, unless a stay is specifically entered by the court.

**3.908-8 Classified information.**

41 U.S.C. 4712 does not provide any right to disclose classified information not otherwise provided by law.

**3.908-9 Contract clause.**

The contracting officer shall insert the clause at 52.203-17, Contractor Employee Whistleblower Rights and Requirement to Inform Employees of Whistleblower Rights, in

all solicitations and contracts that exceed the simplified acquisition threshold.

**PART 52—SOLICITATION PROVISIONS AND CONTRACT CLAUSES**

4. The authority citation for 48 CFR part 52 continues to read as follows:

**Authority:** 40 U.S.C. 121(c); 10 U.S.C. chapter 137; and 51 U.S.C. 20113.

5. Add section 52.203-17 to read as follows:

**52.203-17 Contractor Employee Whistleblower Rights and Requirement to Inform Employees of Whistleblower Rights.**

As prescribed in 3.908-9, insert the following clause:

CONTRACTOR EMPLOYEE WHISTLEBLOWER RIGHTS AND REQUIREMENT TO INFORM EMPLOYEES OF WHISTLERBLOWER RIGHTS ([INSERT ABBREVIATED MONTH AND YEAR OF DATE OF PUBLICATION IN THE FEDERAL REGISTER])

(a) This contract and employees working on this contract will be subject to the whistleblower rights and remedies in the pilot program on Contractor employee whistleblower protections established at 41 U.S.C. 4712 by section 828 of the National Defense Authorization Act for Fiscal Year 2013 (Pub. L. 112-239) and FAR 3.908.

(b) The Contractor shall inform its employees in writing, in the predominant language of the workforce, of employee whistleblower rights and protections under 41 U.S.C. 4712, as described in section 3.908 of the Federal Acquisition Regulation.

(c) The Contractor shall insert the substance of this clause, including this paragraph (c), in all subcontracts over the simplified acquisition threshold.

(End of clause)

6. Amend section 52.212-4 by revising the date of the clause; and removing from paragraph (r) "41 U.S.C. 265" and adding "41 U.S.C. 4712" in its place.

The revised text reads as follows:

**52.212-4 Contract Terms and Conditions—Commercial Items.**

\* \* \* \* \*

CONTRACT TERMS AND CONDITIONS—COMMERCIAL ITEMS ([INSERT  
ABBREVIATED MONTH AND YEAR OF DATE OF PUBLICATION IN THE  
FEDERAL REGISTER])

\* \* \* \* \*

[BILLING CODE 6820-EP]

[FR Doc. 2013-23703 Filed 09/27/2013 at 8:45 am; Publication Date:

09/30/2013]